

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
AVGRAPHICS, INC., JEAN PIERRE AZOULAY
And DARIA MCDERMOTT,

Plaintiffs,

-against-

**AFFIRMATION IN
RESPONSE TO DEFENDANT'S
MOTION TO DISMISS**

NYSE GROUP, INC.,
(successor in interest to New York
Stock Exchange, Inc.) JOHN GREGORETTI,
TONY WALENTY, SAM COCOZZA,
MARGARET DeB. TUTWILER, JOHN THAIN,
individually and as employees of
NYSE GROUP, INC., ANTHONY E. WILSON,
a/k/a TONY WILSON,
DANA GREGORETTI, and
E-TRADE, Securities LLC

07 CIV 8430

Defendants.

-----X

Linda M. Cronin, being duly sworn, states the following
under the penalties of perjury:

1. I am an attorney duly admitted to practice law in
the State and Federal Courts of New York, and I am a Partner
with the law office of Cronin & Byczek, LLP, counsel for
AVGRAPHICS, INC., JEAN PIERRE AZOULAY and DARIA MCDERMOTT,
plaintiffs herein.

2. This affirmation is respectfully submitted in
response to defendant E*TRADE Securities LLC ("E*TRADE")
Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal
Rules of Civil Procedure.

3. This action was commenced by the filing of a Summons and Complaint alleging various theories of liability, including a claim against various defendants under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, et seq. ("RICO"). Before answers were interposed by any defendant, we filed the First Amended Complaint which omits the RICO claims and should have included an additional Federal claim under the Right to Financial Privacy Act of 1978, 12 U.S.C.A. §3401-3422, but did not.

4. After reviewing defendant E*TRADE's Memorandum of Law and revisiting our First Amended Complaint, we believe that we could not sustain an action under 12 U.S.C.A. §3401-3422 and therefore choose not to cross move for amendment of our complaint. We also believe that as our pleading stands now, there is no Federal question, nor can we establish complete diversity.

5. In order to insure our client's protection under CPLR §205 we offer no opposition to defendant E*TRADE's Motion to Dismiss, rather than voluntarily discontinuing our action. Barlow v. Sun Chemical, 18 Misc.3d 953, 838 N.Y.S.2d 387, 2007 N.Y. Slip Op. 27141.


6. The Court should be aware that we contacted counsel for defendant NYSE GROUP, INC. in an attempt to resolve the issue by way of stipulation. Counsel indicated that he would not be inclined to enter into said stipulation.

7. In light of the fact that plaintiffs' claims raise pure issues of New York law, it is respectfully requested that this Court not exercise jurisdiction over this wholly state law claim and decline to address its merits. See, e.g. Seabrook v. Jacobson, 153 F.3d 70, 73074 (2d Cir. 1998) (exercise of jurisdiction over state law claim when all federal claims had been dismissed constituted abuse of discretion); Rounseville v. Zahl, 13 F.3d 625, 631 (2d Cir. 1994) (resolution of novel issue of state law was abuse of discretion where all federal claims had already been dismissed); Morse v. Univ. of Vt., 973 F.2d 122, 127-28 (2d Cir. 1992).

WHEREFORE for all of the foregoing reasons, it is respectfully requested that the motion of Defendant E-Trade should be granted to the extent that it requests a dismissal based on lack of diversity of citizenship and that dismissal is not based on the merits. It is further respectfully requested that this court not exercise supplemental jurisdiction and that Plaintiffs' claims against Defendants should be dismissed for lack of diversity and without prejudice to refiling in State Court; and for such other and further relief as this Court deems just and proper.

Dated: Lake Success, New York
March 19, 2008

CRONIN & BYCZEK, LLP
Attorneys for Plaintiffs

BY: 
Linda M. Cronin (LC0766)
1983 Marcus Avenue
Suite C-120
Lake Success, NY 11042
516-358-1700

STATE OF NEW YORK)
 : ss.:
COUNTY OF NASSAU)

ROSE HORAN, being duly sworn says, I am not a party to the action, am over 18 years of age and reside in the County of Nassau, State of New York.

On March 20, 2008, I served a true copy of the within AFFIRMATION IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated below:

David Smith, Esq.

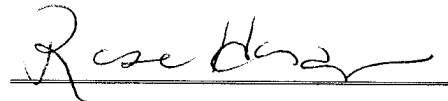
Smith, Campbell, LLP
Attorney for NYSE Group
110 Wall Street
New York, New York 10005

Joseph Samarias, Esq.

Attorney for E-Trade
Cooley Godward Krenish, LLP
One Freedom Square
Teston Town Center
11951 Freedom Drive
Reston, VA 20190-5656

Joan M. Markey

Attorney for Anthony Wilson
and Dana Gregoretti
404 Park Avenue South
16th Floor
New York, New York 10016



ROSE HORAN

Sworn to before me this
20th day of March 2008



Notary Public

Paula Vereen
Notary Public, State of New York
No. 01VE6006230
Qualified in Nassau County 2010
Commission Expires April 27, 2010

Index No. 07cv8430 **Year** 20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AVGRAPHICS, INC., JEAN PIERRE AZOULAY AND DARIA MCDERMOTT,

Plaintiff,

- against -

NYSE GROUP, INC., et al,

Defendants.

AFFIRMATION IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Cronin & Byczek LLP
1983 Marcus Avenue
Suite C-120
Lake Success, New York 11042

(516) 358-1700

To:

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated:

.....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ **NOTICE OF ENTRY** that the within is a (certified) true copy of a
entered in the office of the clerk of the within named Court on 20

☐ **NOTICE OF SETTLEMENT** that an Order of which the within is a true copy will be presented for settlement to the Hon.
one of the judges of the within named Court,
at on 20 , at M.

Dated:

Cronin & Byczek LLP
1983 Marcus Avenue
Suite C-120
Lake Success, New York 11042

To: